No. 721

In the Supreme Court of the United States

OCTOBER TERM, 1960

MARIO DIBELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 31–58) is not yet reported. The opinion of the district court (Pet. 21–30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1960. The petition for a writ of certiorari was filed on December 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied a motion to suppress evidence obtained during the course of a valid arrest.

STATUTE INVOLVED

26 U.S.C. 7607:

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(I) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(l)), may—
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> • • • • •
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

STATEMENT

Petitioner moved in the District Court of the Eastern District of New York to suppress evidence seized at the time of his arrest. The motion was made before, but was acted upon by the district court after, an indictment had been returned. The motion to suppress was denied by the district court without prejudice to renewal at the trial (R. 81a–90a). The court of appeals, after holding the order appealable, affirmed the order of district court (Pet. 31–58). The facts concerning the motion to suppress are as follows:[1]

[1] At the hearing on the motion, the district court listened to oral arguments of counsel and accepted opposing and supporting affidavits.

1. Prior to August 26, 1958, David W. Costa and Daniel W. Moynihan, agents of the Bureau of Narcotics, were conducting an investigation into the suspected illicit narcotic activities of Samuel Panzarella and the petitioner, DiBella. Moynihan, posing as a narcotics buyer, gained Panzarella's confidence and Panzarella agreed to sell heroin to him (R. 29a). Moynihan met Panzarella at 6:00 a.m. on August 26, 1958, in Manhattan. Panzarella stated that he wanted to telephone his source of supply. Following the call, Moynihan was told by him that the delivery would be effectuated at 8:30 a.m. (*ibid.*). Panzarella and Moynihan then drove to Jackson Heights, Long Island. The car was parked on 79th Street, north of Roosevelt Avenue (*ibid.*).

Agent Costa, suspecting that petitioner was Panzarella's source of supply, kept petitioner's home in Jackson Heights under surveillance on the morning of August 26 (R. 26a). Costa observed petitioner leave his home at 7:30 a.m., enter a Chrysler automobile, New York license number 6971NE, and drive to 37th Avenue and 79th Street in Jackson Heights (*ibid.*).

After Panzarella left his car, agent Moynihan observed him walking to 79th Street and 37th Avenue where he entered a Chrysler bearing New York license number 6971NE (R. 26a, 29a). Panzarella and petitioner drove to 79th Street and Roosevelt Avenue followed by Costa. Both agents Moynihan and Costa saw Panzarella leave petitioner's automobile and walk directly to 78th Street. Moynihan met Panzarella there, under Costa's observation, and was handed a

small glassine envelope. The envelope had no tax stamps attached thereto (R. 28a–30a). Subsequent tests showed the contents of the envelope to be heroin hydrochloride (R. 26a, 29a).

2. A second purchase of heroin from Panzarella was arranged by agent Moynihan to take place on September 10, 1958. Moynihan and Panzarella met in Manhattan at 9:30 that evening and Panzarella stated that once again it would be necessary to drive to Jackson Heights to meet his "connection" (R. 29a–30a). At 9:40 p.m. Panzarella placed a telephone call to his "connection" (R. 30a). Moynihan and Panzarella drove to 74th Street and Roosevelt Avenue in Jackson Heights. Agent Costa, watching petitioner's home, saw him leave at 11:00 p.m. and walk to 74th Street and Roosevelt Avenue (R. 26a). At 11:05 p.m. Panzarella left Moynihan in the parked automobile (R. 30a). Both agents observed Panzarella and petitioner meet and walk together from 74th Street to 37th Road (R. 26a; 30a). Panzarella returned to the automobile and enroute to New York City handed agent Moynihan a glassine envelope containing a white powder later found to be heroin hydrochloride. No tax stamps were on the envelope (R. 30a). Panzarella told Moynihan that petitioner was his source of supply (*ibid.*).

3. On October 6, 1958, agents Costa and Moynihan applied for a nighttime search warrant for petitioner's premises, on the basis of affidavits setting forth generally the above facts (R. 25a–31a). The United States Commissioner denied the request (R. 51a–52a).

On October 15, 1958, the Commissioner issued a warrant of arrest, based upon the complaint of agent Costa charging petitioner with the sale of September 10, 1958. The affidavit stated that the sources of the agent's information and belief were "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics" (R. 7a, 21a–22a).[2]

On March 9, 1959, at approximately 8:15 p.m., agent Costa and two other federal narcotics agents, armed with the arrest warrant issued by the United States Commissioner, went to petitioner's apartment in order to arrest him (R. 8a). Petitioner was observed sitting in his living room. The agents rang the bell of the apartment and the door was opened by a stepdaughter of petitioner. Showing her their credentials, the agents identified themselves and were ushered in (R. 9a). The agents then identified themselves to petitioner and showed him a copy of the warrant for his arrest (R. 9a–10a). Two more federal agents came into the apartment and one of these, agent Coyne, was told by petitioner (R. 10a):

> I know what you came for, I have all the stuff in a suitcase in the closet. There's no use in tearing the place apart.

Petitioner led the agents to a closet in his bedroom. Agent Costa removed a brown suitcase from the floor of the closet and opened it. The suitcase contained approximately a pound of heroin, a quantity of cocaine

[2] The warrant was erroneously dated October 6, 1958 (see Pet. App. 22).

and certain paraphernalia used to "cut" narcotics (R. 10a). Agent O'Connor found $6,000 in a shoebox hidden in a closet in petitioner's bedroom. Petitioner later admitted that this money represented profits earned in the sale of narcotics (*ibid.*). He also admitted having bought and sold heroin over a period of years.*

ARGUMENT

1. There is no occasion for this Court to review the validity of the search and seizure at this stage of the proceeding. Indeed, despite the ruling of the court of appeals, we do not believe that the order was an appealable one. The appealability of such orders is determined by ascertaining whether the orders "possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders * * *." *Carroll* v. *United States*, 354 U.S. 394, 403. Here the motion to suppress had no purpose other than in connection with a criminal prosecution. Petitioner moved to suppress the material seized—*i.e.*, "that the Government be estopped from using such items in any criminal proceeding * * *" (R. 6a). Even though the motion was made before indictment, it was not denied until after indictment, and the denial was specifically declared to be without prejudice to a

* The foregoing facts concerning the actual search of petitioner's apartment are taken from the affidavit of the Assistant United States Attorney. An affidavit filed by petitioner's counsel presents another version of the search (R. 34a):
"About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agent."

renewal of the motion at the trial. Under these circumstances, the order of the district court was so directly related to the criminal case as to be a part of it. See *Zacarias* v. *United States*, 261 F. 2d 416 (C.A. 5), certiorari denied, 359 U.S. 935; *Saba* v. *United States*, 282 F. 2d 255 (C.A. 5), pending on petition for a writ of certiorari, No. 643, this Term.[4] See also the Government's Memorandum in *Saba* v. *United States, supra.*

2. In any event, the denial of the motion to suppress was correct because the search was incident to a lawful arrest. The court of appeals properly held that, although the warrant of arrest was invalid because the supporting affidavit did not specify the grounds of the agents' belief except in general terms, the agents had probable cause to arrest without a warrant; therefore, the search and seizure were incident to a valid arrest.

In order for an arrest to be valid without a warrant, there must exist "probable cause" within the meaning of the Fourth Amendment, or, as phrased in the Narcotic Control Act (26 U.S.C 7607(2)), "reasonable grounds" to believe that petitioner had committed or was committing a violation of the narcotics laws.[5] This Court recently defined the standard of probable

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[4] While the decision below is in conflict with *Zacarias* and *Saba*, this conflict cannot justify a grant of the writ of certiorari in the instant case. Petitioner, not the Government, was the beneficiary of the holding that the order was appealable. Petitioner's only quarrel with the court below concerns the merits.

[5] These terms "are substantial equivalents of the same meaning." *Draper* v. *United States*, 358 U.S. 307, 310 at note 3.

cause as follows (*Draper* v. *United States*, 358 U.S. 307, 313):

> "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, [338 U.S. 160,] 175. Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132, 162.

As both the district court (Pet. 26, 29–30) and the court of appeals (Pet. 37–44) held after a thorough review of the record in the instant case, agent Costa, the arresting officer, had more than enough facts within his knowledge to constitute "probable cause." Costa personally observed the transactions with which petitioner was charged. In addition, he was cognisant of the observations of agent Moynihan in relation to these transactions (R. 26a–27a; 28a–30a), and of statements made to Moynihan by Pansarella, petitioner's partner, that petitioner was his source of illegal narcotics (R. 30a). The mere lapse of time between the acts constituting probable cause and petitioner's arrest (approximately six months)* did not eradicate from Costa's mind the transactions

*The transactions took place on August 26, 1958, and September 10, 1958. Petitioner's arrest was made on March 9, 1959.

which he personally observed or was told of, and which formed the basis for petitioner's arrest. Under the statute, as at common law, the agents had authority to arrest without a warrant, on probable cause to believe that an offense had been committed, even though there was time to get a warrant. *Dailey* v. *United States*, 261 F. 2d 870 (C.A. 5), certiorari denied, 359 U.S. 969; see *United States* v. *Rabinowitz*, 339 U.S. 56, 64–66.

Petitioner claims (Pet. 12) that, since the narcotics agents purported to arrest petitioner under an invalid warrant, the Government cannot justify the arrest on the ground that they could properly have made the arrest without a warrant. But this Court has indicated that, even when law enforcement officers have made an arrest pursuant to a warrant which was later found insufficient to authorize it, nevertheless the arrest is valid as long as the officers in fact had probable cause. *Stallings* v. *Splain*, 253 U.S. 339, 342; *United States* v. *Rabinowitz*, *supra*, 339 U.S. at 60.

Petitioner also contends (Pet. 13) that probable cause is not sufficient to support a search at nighttime (approximately 8:15 p.m.) based on an arrest without a warrant. But this Court has never indicated that the validity of an arrest at nighttime depends on any greater showing than the probable cause necessary for arrest at any other time. And this Court has never differentiated between different kinds of valid arrests in determining the validity of a subsequent search. On the contrary, the Court has ruled that a search of the immediate premises depends entirely on the validity of the arrest. *E.g.*, *Abel* v. *United States*, 362 U.S.

217; *United States* v. *Rabinowitz, supra,* 339 U.S. at 60. While petitioner (Pet. 13) relies on *Jones* v. *United States,* 357 U.S. 493, 498–499, that case held only that, under Rule 41 of the Federal Rules of Criminal Procedure, a search without a warrant, *not incident to a valid arrest,* must be based on more than probable cause.[1]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1961.

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[1] Petitioner also contends (Pet. 19–20) that his arrest "was but a pretext to search his apartment." Although petitioner has the burden of proving such bad faith (cf. *Abel* v. *United States, supra,* 362 U.S. at 225–230), he offers no evidence on this point except the speculation of the dissenting judge below that more agents were present at the time of petitioner's arrest than were necessary merely for that purpose (Pet. App. 58, note 1). And petitioner's contention, which is a question of fact, was rejected by the district court (Pet. 22, 30).

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